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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 73-2028

THE JUNIOR CHAMBER OF COMMERCE OF PHILADELPHIA, PA., THOMAS S. RITTENHOUSE, BEVERLY LYNN BENSON, MARGARET M. HIPPLE, ROBERTA M. SCHNEIDER,

Petitioners,

—v.—

THE UNITED STATES JAYCEES, THE UNITED STATES JAYCEES FOUNDATION, THE JAYCEES MENTAL HEALTH AND MENTAL RETARDATION FUND, THE JAYCEES WAR MEMORIAL FUND, GEORGE P. SHULTZ, as Secretary of the Treasury of the United States, DON ALEXANDER, as Commissioner of Internal Revenue, HOWARD PHILLIPS, Acting Director of the Office of Economic Opportunity, JAMES LYNN, as Secretary of the Department of Housing and Urban Development, PETER J. BRENNAN, as Secretary of the Department of Labor, WILLIAM D. RUCKELSHAUS, as Administrator of the Environmental Protection Agency,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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Petitioners, The Junior Chamber of Commerce of Philadelphia, Pa., Thomas S. Rittenhouse, Beverly Lynn Benson, Margaret M. Hipple and Roberta M. Schneider, pray that a writ of certiorari issue to review the judgment of the

United States Court of Appeals for the Tenth Circuit entered on April 16, 1974.

Opinions Below

The opinion of the Court of Appeals for the Tenth Circuit affirming the judgment of dismissal rendered by the United States District Court for the Northern District of Oklahoma has not yet been reported; it is set out in the Appendix, *infra*, at pp. 1a-15a. The opinion of the United States District Court for the Northern District of Oklahoma is unreported, it is set out in the Appendix, *infra*, at pp. 17a-21a.

Jurisdiction

The judgment of the Court of Appeals for the Tenth Circuit was entered on April 16, 1974. This Court has jurisdiction pursuant to 28 U.S.C. §1254(1).

Questions Presented

1. Does the arbitrary exclusion of women from membership in a national civic organization which receives major federal contracts, grants and tax exemptions, and which administers federal health and welfare programs in order to provide leadership training for its members, constitute discriminatory "government action" prohibited by the fifth amendment?

2. May federal agencies award major contracts, grants and tax exemptions to a national civic organization which provides leadership training opportunities for its members but arbitrarily excludes women from membership?

Statement of the Case

Respondent The United States Jaycees [Jaycees] is a national civic organization designed and operated to provide leadership training for young men through participation in community service activities. Membership is open to all males between the ages of 18 and 36 of good moral character. Females are barred from membership regardless of their qualifications. The United States Jaycees is an umbrella organization with numerous affiliated state and local chapters, all of them required to abide by national bylaws that exclude women from membership. The Jaycees and its related foundations receive substantial funding from federal agency grants and contracts and enjoy tax exempt status under 26 U.S.C. §§501(c)(3) and 501(c)(4). The federal contracts and grants, awarded by the Office of Economic Opportunity, Department of Housing and Urban Development, Department of Labor, and Environmental Protection Agency, provide the Jaycees with community service program which its members administer, promote and implement in partnership with these federal agencies in order to obtain experience that will assist them in obtaining and performing executive positions.[1]

In the past several years, various Jaycee chapters have questioned (either on their own or because of community pressure, inquiries by state officials charged with enforce-

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[1] The programs cover an enormous range of civic activity, *e.g.*, prevention of alcohol abuse, control of venereal disease, prevention of child abuse, environmental education, a criminal justice program, programs for low cost housing and transportation for the elderly. With respect to some of these programs, Congress has stipulated expressly that "to the maximum extent feasible," [programs] contribute to the "elimination of artificial barriers to employment and occupational advancement." 42 U.S.C. §2769c(c).

ment of antidiscrimination laws, threats of litigation by females who desire membership) the propriety and legality of excluding women from membership. As a result, a number of chapters have admitted women.

The first chapter to admit women was the Junior Chamber of Commerce of Rochester, New York [Rochester]. Because it admitted women, Rochester was expelled from the national organization in April, 1972, and warned against using the name "Jaycees." In October, 1972, Rochester and several of its members commenced an action against The United States Jaycees and its affiliated foundations (the other Jaycee respondents) as well as the federal agencies (hereinafter government respondents) which award contracts, grants and tax exemptions to The United States Jaycees and its affiliated foundations. The action was instituted in the United States District Court for the District of Columbia, but on the motion of the Jaycees was transferred to the Northern District of Oklahoma.

The complaint sought *inter alia* an injunction prohibiting The United States Jaycees from excluding women from membership and restoration of Rochester's status as part of The United States Jaycees or, in the alternative, an injunction prohibiting the federal agencies from awarding contracts, grants or tax exemptions to The United States Jaycees so long as they exclude women from membership.

In July, 1972, the Philadelphia Junior Chamber of Commerce [Philadelphia] admitted women to membership and was threatened with expulsion from the national organization by June 14, 1973, unless it conformed to the discriminatory bylaw. Philadelphia and several of its members sought permission to become additional plaintiffs in the

Rochester action. Permission was granted with the consent of the respondents. Further, again with the consent of The United States Jaycees, an injunction was entered prohibiting The United States Jaycees from expelling Philadelphia pending the district court's ruling on the government defendants' motion to dismiss the complaint for failure to state a claim against them.

The primary thrust of the government defendants' motion to dismiss was the alleged absence of any nexus between the discriminatory policy of the Jaycees and government assistance. It was evident, however, and the Tenth Circuit so declared, that The United States Jaycees receive and administer "substantial grants on behalf of the government."

On June 26, 1973, in a two page opinion, Judge Bohanon of the Northern District of Oklahoma dismissed the entire case as to *all* respondents, without affording plaintiffs the opportunity for complete discovery and trial. Although it was beyond debate that the Jaycees practiced sex discrimination in its most blatant and obnoxious form, and equally beyond debate that the Jaycees "administer substantial grants on behalf of the government," the district judge ruled that "the federal question was insubstantial."

On June 26, 1973, without notice, the Jaycees expelled Philadelphia from the national organization. On June 28, 1973, all plaintiffs filed a Notice of Appeal to the United States Court of Appeals for the Tenth Circuit. Philadelphia sought an order staying its expulsion from the national organization, but its request was denied by the Tenth Circuit.

On April 16, 1974, the Tenth Circuit affirmed the judgment of the district court. It declared that, despite the

substantial extent to which the Jaycees operate on government funds, the Jaycees' discriminatory membership policy does not constitute "government action" subject to fifth amendment scrutiny. Further, it declared that the government defendants did not violate the fifth amendment equal protection principle because federal assistance granted the Jaycees was not connected to the "males only" membership rule maintained by the Jaycees. In reaching its determination, the Tenth Circuit considered dispositive this Court's decisions in *Moose Lodge No. 107* v. *Irvis*, 407 U.S. 163 (1972), and *Walz* v. *Tax Commissioner*, 397 U.S. 664 (1970). Focusing almost exclusively on tax exemptions granted the Jaycees, the Tenth Circuit's legal analysis virtually ignores the extensive allegations of the complaint and proof submitted at the evidentiary hearing establishing constant government support of and close relationship to the Jaycees through federal contract and grant programs.[2]

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[2] This deficiency in the Tenth Circuit opinion was noted by a federal court that decided the identical question against the Jaycees. *The New York City Jaycees, Inc.* v. *United States Jaycees, Inc.*, S.D.N.Y. No. 74 Civ. 652 at n. 34 (June 13, 1974), opinion set out in the Appendix, *infra*, pp. 22a-46a. A notice of appeal to the Second Circuit was filed by the United States Jaycees on June 28, 1974.

REASONS FOR GRANTING THE WRIT

The decision of the court below raises a substantial issue as to the scope of the Constitution's equal protection guarantee. It threatens shrinkage of the "state (government) action" concept to the point where women will be denied meaningful constitutional protection against officially sanctioned discrimination. And it augurs a chaotic state of affairs in the lower courts unless this Court provides prompt and clear guidance. The determination that a civic organization with an established policy of invidious sex discrimination may engage in the performance of programs on behalf of the government and train its members on government grants is inconsistent with decisions of this Court and in square conflict with decisions of other lower federal courts. Because of the national character of the Jaycees, the question is likely to be presented in various courts, generating unnecessary waste of judicial resources and compounding the existing uncertainty. Indeed, after the Tenth Circuit's decision, a district court in the Second Circuit considered the identical issue, found "state (government) action," and issued a preliminary injunction prohibiting the expulsion of The New York City Jaycees.[3] Thus, women's access to the federally financed training and advancement opportunities Jaycee membership affords depends on the federal district in which they happen to reside. This unfair and unseemly situation merits immediate resolution by this Court.

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[3] *The New York City Jaycees, Inc.* v. *United States Jaycees, Inc.*, S.D.N.Y. June 13, 1974, set out in the Appendix, *infra*.

1. The decision below is inconsistent with decisions of this Court condemning discrimination facilitated, promoted or supported by government assistance.

In *Burton* v. *Wilmington Parking Authority*, 365 U.S. 715 (1961); *Norwood* v. *Harrison*, 413 U.S. 455 (1973); and *Gilmore* v. *City of Montgomery*, 42 U.S.L.W. 4920 (June 17, 1974), this Court held that discrimination ceases to be a "private" activity when it is supported, encouraged or significantly assisted by government actions so that it carries connotations of official approval. While provision of generalized or routine government services will not convert private activity to public activity, *Moose Lodge No. 107* v. *Irvis*, *supra*, substantial assistance will when it signals to the public particularized official involvement with the actor.

The court below held that the Jaycees discriminatory membership policy was not subject to constitutional prohibition because there was no causal connection between the Jaycees receipt and administration of substantial government grants, contracts and tax exemptions and its membership policy. It recognized, however, that discrimination by the Jaycees among the ultimate beneficiaries of the federal funds would be constitutionally prohibited. This distinction misconstrues the nature of the Jaycee organization in which members are beneficiaries of the federal funds insofar as these funds provide them with the opportunities for leadership training and supplementary education for employment advancement. Furthermore, it erodes the equal protection clause and the national policy which mandates eradication of arbitrary gender-based barriers.

In *Norwood* v. *Harrison*, *supra*, this Court instructed that different degrees of government involvement consti-

tute "state action" for different constitutional purposes and that substantial assistance to an *institution* which has an established policy of discrimination is unlawful affirmative support of that policy. And in *Moose Lodge No. 107, supra,* the Court emphasized that Pennsylvania did not benefit from the lodge as Delaware benefited from the restaurant in *Burton* v. *Wilmington Parking Authority, supra.* The Tenth Circuit, however, woodenly applied a "nexus" test which it had developed in a procedural due process context (*Ward* v. *St. Anthony Hospital,* 476 F.2d 671 (1973)), and did not advert to the benefit derived by the government through Jaycees administration of public health and welfare programs, the benefits derived by the members or the benefit to the institution itself.

Moreover, the Tenth Circuit's expansive reading of *Walz* v. *Tax Commissioner, supra,* is an egregious distortion of this Court's position on "state action." *Walz* sanctioned a real property tax exemption for all associations organized exclusively for religious purposes; it is hardly relevant precedent for massive government funding of a civic organization that categorically discriminates on the basis of a birth characteristic unrelated to ability to perform or to contribute to the community.

The Tenth Circuit interpretation of *Moose Lodge* and *Walz* can only succeed in encouraging constitutionally prohibited discrimination. The decision permits an organization to receive unlimited financial assistance—contract grants and tax exemptions—although it engages in invidious discrimination in its membership and compels chapters to do the same as a condition of sharing these benefits. It permits government agencies to provide unlimited grants and contracts to any organization regardless of its estab-

lished policy of invidious discrimination. In short, the unprecedented holdings of the courts below severely undermine the constitutional prohibition against government supported discrimination. Under the peculiar logic of the Tenth Circuit's opinion, the state or federal government could provide unlimited funds to schools, hospitals or other institutions that discriminate in designating teachers, doctors, and others to administer the funds, so long as they do not discriminate among students, patients or other beneficiaries.

2. This case presents a vital test of the extent to which women are beneficiaries of the equal protection guarantee.

Exclusion of women from participation as equals in a national civic organization styling itself a "supplementary educational institution" designed to provide advancement opportunities is invidious discrimination of the kind described by this Court in *Frontiero* v. *Richardson*, 411 U.S. 677, 686 (1973). The failure of the Tenth Circuit to apply to sex discrimination the tests of "state action" developed by this Court in race discrimination cases threatens an inferior brand of constitutional protection for women's rights to equal opportunity. The question whether a national civic organization may maintain a policy of sex discrimination when it receives substantial federal funds must be resolved by this Court to prevent the application of disparate standards by lower courts depending upon whether the issue is sex discrimination or race discrimination.

3. Unless resolved by this Court, the issue in this case will be the subject of prolific litigation productive of conflicting constitutional interpretations.

Because the United States Jaycees is a national organization with local chapters throughout the country, several of which have already admitted women, the constitutionality of the Jaycees bylaw is bound to be litigated in various courts. There is currently a conflict between the result in this case involving Rochester and Philadelphia and the result in litigation commenced by The New York City Jaycees, *The New York City Jaycees, Inc.* v. *United States Jaycees, Inc.*, S.D.N.Y. June 13, 1974, set out in the Appendix, *infra*. Unless this Court resolves the issue, other Jaycee chapters will be faced with an untoward dilemma as to the constitutionality of their action in admitting or excluding women. They will be confronted with the threat of expulsion by the Jaycees if they admit women, and the threat of litigation by women or adverse action by state officials charged with administration of antidiscrimination laws if they do not. The constitutionality of the membership policy of a particular chapter should not depend upon its location or the composition of the forum invoked by one side or the other to resolve the dispute.

4. The Tenth Circuit's restrictive interpretation of "state action" in discrimination cases is in conflict with the clear decisional trend in the lower courts.

The decision of the court below is the first and only decision holding that a private organization may practice invidious discrimination while receiving substantial federal grants and contracts. In reaching this result the Tenth

Circuit applied a test of "state action" in square conflict with the test used by the Second Circuit, most recently in *Jackson* v. *The Statler Foundation*, —— F.2d ——, Slip Opinion No. 46 (April 5, 1974), and by several three judge courts. *McGlotten* v. *Connally*, 338 F. Supp. 448, 452 (D.D.C. 1972); *Falkenstein* v. *Dept. of Revenue*, 350 F. Supp. 887, 888 (D. Ore. 1972), appeal dismissed, 409 U.S. 1099 (1973); *Green* v. *Connally*, 330 F. Supp. 1150 (D.D.C. 1971) (three judge court), aff'd sub nom. *Coit* v. *Green*, 404 U.S. 997 (1971). Accord, *Male* v. *Crossroads Associates*, 469 F.2d 616 (2d Cir. 1972); *Stern* v. *Massachusetts Indemnity & Life Ins. Co.*, 365 F. Supp. 433 (E.D. Pa. 1973); *Golden* v. *Biscayne Bay Yacht Club*, 370 F. Supp. 1038 (S.D. Fla. 1973); *Keller* v. *Kate Maremount Foundation*, 365 F. Supp. 798 (N.D. Calif. 1972).

As these decisions indicate, there is a vast difference between government assistance, such as police and fire protection, routinely provided to all without any connotation of approval, and government provision of financial resources necessary to sustain an organization's operational programs. Choice of the Jaycees to perform federal contracts and receive federal grants, and the Jaycee's substantial dependence on government funding, surely signal to the public government approval and encouragement.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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